

**DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 96-0565 ITC
WITHHOLDING TAX
For Years 1995 AND 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Withholding Tax- Liability of Employer

Authority: 45 IAC 3.1-1-97

Taxpayer protests assessment of tax on lump sum payment.

II. Tax Administration- Penalty

Authority: 45 IAC 15-11-2; IC § 6-8.1-10-2.1

Taxpayer protests the penalty assessed.

III. Tax Administration- Interest

Authority: IC § 6-8.1-10-1

Taxpayer protests the imposition of interest.

STATEMENT OF FACTS

Taxpayer is a subcontractor who was contracted to provide labor and/or materials for a lump sum improvement to realty in Indianapolis, Indiana. The taxpayer was not registered with the Secretary of State nor was it registered with the Department of Revenue as a withholding agent. The audit investigation assumed that the company provided labor only and that all moneys received were subject to adjusted gross income tax withholding. The period under investigation was May 25, 1995 through June 26, 1996.

The investigation was completed on August 23, 1996. Taxpayer, in a letter dated October 17th, 1996 stated it was trying to resolve the matter by determining the correct amount of tax that

should have been paid. On October 23rd, 1996 it remitted a check in the amount of \$10,399.00, which the taxpayer believed to be the correct amount of tax due. On October 30, 1996, a power of attorney was requested and received with a letter stating information would be furnished from which the department would be able to determine the total amount of wages paid on the project in question.

On March 27th, 1997, the file was returned to the auditor for resolution. The auditor contacted the taxpayer for additional information on April 1st, 1997 by telephone and by letter dated May 9th, 1997. On June 4th, 1997 the file was returned to the Legal Division unresolved with notation that the taxpayer representative had not contacted the auditor.

On September 1st, 1998 the hearing officer wrote taxpayer's representative and asked for additional information in order to resolve the investigation. On September 17th, 1998, the day the taxpayer representative's letter was returned to the department by the post office, a copy of the letter was faxed to the president of the corporation with a follow up letter dated October 26th, 1998. The letter dated September 1st, 1998 was again faxed on October 30th, 1998 as requested by the taxpayer.

After further contacts, taxpayer representative provided a breakdown of costs associated with the project on January 29th, 1999, admitting a tax liability \$10,685 (\$284 more than taxpayer's original estimate and payment) and requesting a waiver of penalties and interest. A hearing was set for October 11th, 2001, taxpayer did not respond and this Letter of Finding was prepared based on documentation already submitted by taxpayer.

I. Withholding Tax- Liability of Employer

Taxpayer was assessed based on 45 IAC 3.1-1-97, which states in relevant part:

Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code (USC Title 26), are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax.

Inasmuch as no information was available to the auditor, the tax was assessed on 100% of the amount paid to the taxpayer.

Taxpayer has since provided a purported breakdown of costs and expenses associated with the project in question that alleges the actual liability was \$10,685. Inasmuch as this documentation is self-authenticated the proposed adjustment will be subject to- and contingent on- audit review.

FINDING

Taxpayer protest is sustained subject to audit verification.

II. Tax Administration- Penalty

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code 45 IAC 15-11-2 further provides:

....(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer failed to file or register with the state of Indiana while conducting a major construction project within the state. When taxpayer was contacted and assessed there was over a two year delay in responding with information as to taxpayer's operations within this state. While Department concurs with taxpayer's claim of no malicious intent, the imposition of the negligence penalty is based on this "... taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." 45 IAC 15-11-2. No grounds exist for waiver of the negligence penalty.

FINDING

Taxpayer protest is denied.

III. Tax Administration- Interest

Taxpayer has requested a waiver on the interest applied to the liability pursuant to IC 6-8.1-10-1, which states in relevant part:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

....

(e) Except as provided by IC § 6-8.1-5-2(f)2 [an extension signed and agreed to by Department and taxpayer] the department may not waive the interest imposed under this section.

No agreement was entered by taxpayer and Department, and absent this no waiver of interest is permitted by the statute.

FINDING

Taxpayer protest is denied.